89-267

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

F. KENNETH CHRISTOPHER,

Petitioner,

v.

MADISON HOTEL CORPORATION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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438

QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals' interpretation of Virginia law on the assumption of the risk doctrine unreasonable and in direct conflict with the Virginia Supreme Court?

2. Did the Court of Appeals err by upholding the exclusion of petitioner's expert witness, an engineer and human factors expert?

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Petitioner filed a negligence complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division. A jury trial was held on July 13, 1988 with the Honorable Claude M. Hilton presiding. Defendant's motion in limine to exclude the testimony of plaintiff's expert witness, John G. Kreifeldt, Ph.D., was granted. At the close of plaintiff's case, the judge granted a directed verdict for the defendant based on the doctrine of assumption of the risk. In an unpublished decision dated May 4, 1989, the United States Court of Appeals for the Fourth Circuit (Nonard, J., United States District Judge for the District of Maryland, sitting by designation) affirmed (Appendix at A2). A petition for rehearing en banc was denied on May 26, 1989 (Appendix at A10).

JURISDICTION

The unpublished decision of the Fourth Circuit Court of Appeals was filed on May 4, 1989. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 26, 1989. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The relevant Fed.R.Evid. provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702.

A relevant Virginia statute concerning the liability of a hotel states as follows:

Section 35.1-28. Liability.

A. It shall be the duty of any person owning or operating a hotel to exercise due care and diligence in providing honest and competent employees and to take reasonable precautions to protect the persons and property of the guests of the hotel. No hotel shall be held liable in a sum greater than $300 for the loss of any wearing apparel, baggage, or other property not hereinafter mentioned belonging to a guest when such loss takes place from the room or rooms occupied by the guest. Unless the loss shall take place from the office of the hotel after the valuables are deposited there, no hotel shall be liable for any loss by any guest of jewelry, money, or other valuables of like nature belonging to any guest if the hotel shall have posted in the room or rooms of the guest in a conspicuous place, and in the office of the hotel, a notice stating that jewelry, money, and other valuables of like nature must be deposited in the office of the hotel. The hotel shall not be obligated to receive from any one guest for deposit in such office any property hereinbefore described exceeding a total value of $500.

B. Each guest's room shall have suitable locks on its doors and windows unless permanently secured. If a guest fails to lock the doors or windows of his room, the hotel shall not be liable for

any property taken from the room in consequence of such failure on the part of the guest. The burden of proof shall be upon the operator of the hotel to show that he complied with the provisions of this section and that the guest failed to comply with these requirements.

C. In the case of loss by fire or overwhelming disaster, a hotel shall exercise ordinary and reasonable care in the custody of the baggage or other property of its guests, but in no case shall the hotel's liability exceed $250 to any one guest unless the negligence of the hotel was the cause of the fire or overwhelming disaster.

D. No liability shall attach to any hotel for the baggage, hats, umbrellas, coats, or other wearing apparel of a guest until the same is place by the guest in the actual custody of an employee of the hotel. The mere depositing of such baggage, hats, umbrellas, coats, or other wearing apparel inside the hotel shall not be construed as putting in actual custody until taken in charge by the hotel or its employee, or properly placed in a room or rooms assigned to the guest.

E. Nothing contained in this section shall be construed so as to change or alter the principles of law concerning a hotel's liability to a guest or other person for personal injury, nor to exempt in any way the owner or operator of a hotel from being liable for the value of any property of guests taken or stolen from any room therein by any employee or agent of the hotel.

F. A notice of the provisions of this section shall be posted conspicuously in each guest's room. (Code 1950, Sections 35-10, 35-11, 35-12, 35-13; 1981, c. 468).

Va. Code Ann. Section 35.1-28 (1984).

STATEMENT OF THE CASE

The petitioner, F. Kenneth Christopher, 47, is a resident of Medford, Massachusetts and is a management analyst for the United States Army. On January 21, 1986, while on a business trip, petitioner checked into the Comfort Inn Motel in Alexandria, Virginia. The Comfort Inn was operated and managed by the respondent, Madison Hotel Corporation.

On the evening of January 21, 1986, the petitioner used the bathroom facilities in his motel room to take a shower. When the petitioner walked into the bathroom, he noticed a terry cloth bath mat

draped over the side of the tub. He picked it up and put it down on the floor near the tub. After taking his shower, the petitioner stepped out of the tub with his left foot onto the bath mat, and with his right hand, held onto a metal rail to his right. He then shifted his weight over to his left foot and started to bring his right foot up and over the tub when the bath mat slid out from under the plaintiff's left foot, causing him to fall. He suffered severe leg injuries, severing his patellar tendon, making his kneecap about four inches higher than it is supposed to be. He also suffered severe spinal injuries. The petitioner's screams of pain were heard outside of his room and help arrived to transport him to a hospital. The petitioner stayed at an Alexandria hospital overnight, and then was transferred to the Parker Hill Hospital in Boston. The petitioner's injuries

have caused severe pain for a prolonged period, severely impacted his ability to work, and otherwise have had a major impact on his lifestyle. Petitioner brought suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, against defendant Madison Hotel Corporation. Jurisdiction was based on diversity of citizenship.

The petitioner sought at trial to present expert testimony by John G. Kreifeldt, Ph.D., a design engineer and professor of engineering at Tufts University. Dr. Kreifeldt's testimony would have explained tests he conducted with respect to the anti-slip coefficient of friction between the terry cloth bath mat and vinyl flooring and would have offered expert opinion concerning the dangerous condition created by using the terry cloth bath mat on vinyl flooring, as well

as his opinion that the petitioner's fall was causally related to the use of the terry cloth bath mat on the vinyl flooring. Upon motion of the respondent, the judge refused to allow the proffered testimony to be admitted into evidence. At the close of the petitioner's evidence, the trial judge allowed the respondent's motion for a directed verdict on the following basis:

> [T]his plaintiff [petitioner] had every opportunity to and did in fact observe the floor, he knew it was slick, he observed the towel, and he testified clearly he knew exactly what it was. He put it on the floor and used it knowing exactly what he was using. And if there was any negligence on the part of the motel in this case, the plaintiff by his own testimony has assumed the risk of whatever he did.

Christopher v. Madison Hotel Corp., No. 88-3149, App. at 144-45 (4th Cir. May 4, 1989).

On appeal, the Fourth Circuit Court of Appeals affirmed the trial judge's

decision on both the nonadmissibility of the expert testimony and on assumption of the risk.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION AND APPLICATION OF VIRGINIA LAW BY HOLDING THAT PETITIONER ASSUMED THE RISK AS A MATTER OF LAW.

Admittedly, the general practice of the Supreme Court is to place considerable confidence in the interpretations of state law reached by the court of appeals. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983). Although the Supreme Court will ordinarily accept the determination of state law by the court of appeals, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), the rule is not ironclad. Federal court determinations

of state law are not binding on the Supreme Court. 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Section 4036 (1988). The Supreme Court has the authority to differ with the lower federal courts as to the meaning of state law. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); see also Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) (Supreme Court is hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable); California State Board of Equalization v. Chemeheuri Indian Tribe, 474 U.S. 9 (1985), reh'g denied, 106 S.Ct. 839 (1986) (resolving question of state law).

It is respectfully submitted that the court of appeals' determination of Virginia law on assumption of the risk was unreasonable and merits review.

While getting out of the hotel bathtub, petitioner slipped fell on a terry cloth bath mat, permanently injuring his knee and spine. The court of appeals held that the use of the bath mat by petitioner for the very purpose it was provided by the motel was so venturous that "reasonable minds could not differ that [petitioner] voluntarily assumed a known risk." Christopher v. Madison Hotel Corp., No. 88-3149, slip op. at 5 (4th Cir. May 4, 1989). This interpretation of Virginia law cannot be reconciled with the Virginia Supreme Court's holding in Amusement Slide Corp. v. Lehmann, 217 Va. 815, 232 S.E.2d 803 (1977). The plaintiff in Amusement Slides was injured while riding on the "Sky Slide," an amusement park entertainment device on which patrons slide down a large slide on a film of wax with burlap pads. On appeal from a judgment

for plaintiff, defendant argued assumption of the risk as a matter of law. The factors which weighed in favor of assumption of the risk were succinctly stated in a dissenting opinion:

> We have here a 27-year-old man who admitted that he was familiar with the manner in which sky slides are operated. He must have known the variables involved. He had just witnessed an accident. The signs that he saw, and the recordings that he heard, apprised him of the fact that the slide posed an element of danger to all users, particularly to those over the age of twenty-five years, as was [plaintiff]. [He] was told that the lane he was to use had just been waxed. He therefore knew he was to be its first user after the waxing. Notwithstanding all the warnings, and his knowledge of and previous experience with sky slides, he ventured to take the ride which resulted in the accident. He had been warned of just this possible result.

232 S.E.2d at 806 (Harrison, J., dissenting).

Under these facts, however, the Virginia Supreme Court held that it was a jury question whether plaintiff assumed the

risk, because "reasonable men [could] differ [over] whether plaintiff fully appreciated the nature and extent of the risk involved." Id. at 805. The Amusement Slides Corp. plaintiff recovered, even though he voluntarily chose to "slip and slide" down a risky path. It is difficult to envision how petitioner's "slip and slide" in the instant case was somehow more venturous or voluntary in nature than that of the plaintiff in Amusement Slides. It was, of course, much less adventurous.

Similarly, in Colonial Natural Gas Co. v. Sayers, 222 Va. 781, 284 S.E.2d 599 (1981), plaintiff-tenant Sayers was injured when, while walking along a footpath at night, he fell into an open ditch containing a gas line. On appeal from a jury verdict for plaintiff, the supreme court again rejected the doctrine of assumption of the risk:

> There was evidence that Sayers knew that a gas line had been installed several months previously. But there was also evidence that he did not know that there was an open ditch resulting from settlement of the ground where the installation had been completed. Even if it was proper to submit the issue to the jury, certainly we cannot say as a matter of law that Sayers voluntarily assumed the risk of injuring himself in the open ditch.

284 S.E.2d at 601.

Just as Sayers did not assume the risk of injury by walking along a footpath at night, the plaintiff in the instant case did not assume the risk by stepping out of a shower onto a bath mat which had been provided specifically for that purpose.

The essence of assumption of the risk is "venturousness in voluntarily incurring a risk the nature and extent of which are fully appreciated." Virginia Electric & Power Co. v. Winesett, 225 Va. 460, 303 S.E.2d 868, 875 (1983); see also

Kings Market v. Yeatts, 226 Va. 174, 307 S.E.2d 249 (1983); Stoner v. Robertson, Administrator, 207 Va. 633, 151 S.E.2d 366 (1966) ("knowledge of the risk involved is essential to its assumption") Budzinski v. Harris, 213 Va. 107, 189 S.E.2d 372 (1972). Under Virginia law, responsibility for the condition of hotel premises rests primarily on the innkeeper, and the guest may generally assume that the premises are safe. Kirby v. Moehlnan, 182 Va. 876, 30 S.E.2d 548 (1944); see also Va. Code Ann. Section 35.1-28 (1984) (statutory provision requiring hotel owners to take reasonable precautions to protect guests). Given the presumption of safety in hotel premises, the crucial question is whether the petitioner fully appreciated the nature and extent of the risk when he stepped out of the shower. As stated above, a plaintiff does not assume

a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character. Thus, the condition of the premises upon which he enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent or, if know or apparent at all, it may appear to him or her to be so slight as to be negligible. In such a case the plaintiff does not assume the risk. 57A Am.Jur. 2d "Negligence" Section 825 (1989) (citing Restatement (Second) of Torts Section 496D comment b (1989)). Petitioner as a reasonable person was aware of the slight risk of a slip-and-fall injury involved when taking a shower. But a jury question is presented as to whether petitioner was specifically aware of the peculiar danger involved when using a terry cloth bath mat on a vinyl floor.

The Fourth Circuit Court of Appeals has held, in effect, that under Virginia law, those who venture to take showers in motel rooms assume greater risks, and are more reckless, then those who ride on dangerous amusement park rides. This unreasonable holding conflicts with the Virginia Supreme Court's binding interpretation of Virginia law and warrants review.

II. THE COURT OF APPEALS ERRED BY UPHOLDING THE EXCLUSION OF PETITIONER'S EXPERT WITNESS, AND ENGINEER AND HUMAN FACTORS EXPERT.

During trial, the plaintiff attempted to call as an expert witness John G. Kreifeldt, Ph.D., a professor of engineering design at Tufts University. The trial court's refusal to allow this testimony was based on two separate grounds. The first ground appeared to relate to the requirement of Fed.R.Evid.

702 that expert testimony "assist the trier of fact to understand the evidence":

> I think that what [the expert] would testify to as far as this being slippery is certainly within the province of the jury to know. I think all of us in this courtroom and the jury knows [sic] full well that this floor and this mat and the water involved is [sic] going to be slippery.

(Trial Court Transcript at 76-77.)

It is respectfully submitted that the trial judge's ruling that the expert testimony of Dr. Kreifeldt would not aid the jury in this case was an abuse of discretion.

Under Fed.R.Evid. 702, relating to testimony of experts, the standard for determining whether the expert testimony will assist the jury is a broad one. Robertson v. McCloskey, 680 F.Supp. 408 (D.D.C. 1988). The essential inquiry is this: "On this subject can a jury from this person receive appreciable help?:

Id. at 409 (citing Wigmore on Evidence Section 1923 at 21 (3d ed. 1940)) (emphasis in original). Moreover, under Rule 702, there is a presumption that expert testimony will be helpful. In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).

In the instant case, defendant relied on Scott v. Sears Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986), in claiming that the "human factors" expert testimony is inadmissible (Tr. at 70-72). Such reliance is misplaced. Scott was a slip-and-fall case where the plaintiff caught her heel in a curb defect outside a store and broker her leg. At trial, an expert testified for the plaintiff as to probable human reaction to the existing environmental conditions. Following a jury verdict for the plaintiff, the

defendant appealed, contending that the "human factors" expert testimony was inadmissible. The Fourth Circuit did hold that some of the expert's particular testimony was erroneous. Nevertheless, the expert's testimony that the yellow color of the curb might prompt the human eye to fill in discontinuities was held proper, as a "paradigm of admissible human factors testimony." Id. at 1055. The Scott case clearly did not rule that "human factors" expert evidence is per se inadmissible. To the contrary, Scott's holding supports the plaintiff's position in the instant case; "human factors" testimony as to the slipperiness of a particular towel on a particular surface would seem to be just as relevant as "human factors" testimony as to the effect of color on human perception. It is noteworthy that, consistent with the holding in Scott, other "human factors"

expert testimony has found acceptance in the federal courts. See, e.g., Collins v. Seaboard Coast Line Railroad, 675 F.2d 1185 (11th Cir. 1982) (in railroad-crossing accident case, trial court properly permitted testimony of "human factors" safety expert).

Even more noteworthy, for purposes of the instant case, is the existence of case law involving slip-and-fall injuries, where expert testimony as to the slipperiness of a surface, based on the coefficient of friction, was held properly admissible. In Hlavaty v. Sono, 107 Ariz. 606, 491 P.2d 460 (1971), for example, plaintiff brought an action against a restaurant owner for injuries sustained when she fell while attempting to sit in a chair. Just as she started to sit, the chair slipped out from under her. The plaintiff called as a witness an engineer, who testified that this

tests revealed that the floor was slippery for leather heels, and specifically that the anti-slip coefficient of friction was .22. He further testified that the coefficient of friction for the chairs in the restaurant was between .19 and .25, which meant that the chairs would "slide easily" across the floor with little force. 491 P.2d at 462. The Supreme Court of Arizona reversed a directed verdict for the defendant, holding that the expert testimony, in and of itself, was sufficient for evidence from which a jury could find that the defendant failed to maintain the floor in a reasonably safe condition. See also Ewing v. Russell, 81 S.D. 563, 137 N.W.2d 892 (1965) (in slip-and-fall action, judgment on jury verdict for defendants upheld, based on expert witness for defendant who testified as to "coefficient of friction" of floor where fall

occurred). Cf. Placania v. Riach Oldsmobile Co., 53 Wash.2d 171, 332 P.2d 47 (1958) (experienced floor finisher could testify as an expert in slip-and-fall case as to propensities of service garage floor to be slippery when covered with accumulation of oily substance, ice, or snow).

Based on the liberal standard of admissibility under Fed.R.Evid. 702, the holding in Scott, and the factually similar state law cases, the trial judge erred by ruling the testimony of Dr. Kreifeldt would not aid the jury.

The trial court appeared to base its rejection of the proffered expert testimony on a second separate ground:

> [W]ell, [Dr. Kreifeldt] still hasn't said that there is an industry standard in the motel industry for certain coefficients of friction for guest bathrooms. And that's the burden you have if you want to try to put in this kind of evidence.

(Tr. at 79)

The court went on to rule that in the absence of evidence of such a standard, any such testimony would be prejudicial (Tr. at 80). The plaintiff stands by the response made by counsel in his discussion with the trial judge: "I would suggest, Your Honor, that I am not attempting to set up a standard and knock it down here. All I am trying to do is measure the extent of the slipperiness for the jury and the significance of it" (Tr. at 80). Plaintiff's expert would not have testified that the defendant violated an industry standard for coefficients of friction in motel rooms; such evidence is not necessary. The fact that the defendant did not violate any existing standards by using terry cloth bath mats and may have used the same standard of care as other motels, does not preclude a finding of negligence. As Justice Holmes' now classic statement of

the subject expresses it, "[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not." Texas & Pacific Railway v. Behymer, 189 U.S. 468, 470 (1903); see also The T. J. Hooper, 60 F.737 (2d Cir. 1932). The second grounds for exclusion of the expert testimony is similarly in error. Because of the erroneous rulings on the law relating to the admissibility of the expert testimony and the court's abuse of discretion in excluding the testimony, the judgment for the defendant should be vacated and a new trial ordered.

CONCLUSION

For the foregoing reasons, the petitioner, F. Kenneth Christopher,

respectfully request this Court to grant his petition and issue a Writ of Certiorari to the Fourt Circuit Court of Appeals.

Respectfully submitted,

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DATED: August 14, 1989

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

F. KENNETH CHRISTOPHER,

Petitioner,

v.

MADISON HOTEL CORPORATION,

Respondent.

WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-3149

F. KENNETH CHRISTOPHER

Plaintiff-Appellant

v.

MADISON HOTEL CORPORATION

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Virginia,
Alexandria, Virginia.
Claude M. Hilton, District Judge
(C/A 88-14-A)

Argued: March 6, 1989
Decided: May 4, 1989

Before MURNAGHAN, Circuit Judge, STAKER, United States District Judge for the Southern District of West Virginia, sitting by designation, and HOWARD, United States District Judge for the District of Maryland, sitting by designation.

Harvey R. Peters (Peters, Smith & Moscardelli) for Appellant; Richard A. Yeagley (Thomas M. Wochok and Associates) for Appellee.

HOWARD, District Judge

On January 21, 1986, F. Kenneth Christopher was a guest at the Comfort Inn Motel in Alexandria, Virginia, a motel operated and managed by the Madison Hotel Corporation. While getting out of the bath tub, he slipped and fell on a two-sided terry cloth bathmat, injuring his knee. He sued the defendant for negligence. The trial judge excluded the testimony of the plaintiff's expert witness and granted the defendant's motion for a directed verdict, on the ground that Mr. Christopher assumed the risk of his injuries. Finding no error, we affirm.

I.

Mr. Christopher attempted to call John G. Kreifeldt, Ph.D., a design engineer, to testify at trial. Dr.

Kreifeldt's testimony would have explained tests he conducted with respect to the anti-slip coefficient of friction between the terry cloth bathmat and vinyl flooring, the dangerousness of these conditions, and his opinion that Mr. Christopher's fall was causally related to these conditions. Citing Fed.R.Evid. 702 and 403, the trial judge excluded this testimony because it would not assist the jury and because any probative value was outweighed by the potential for prejudice.

Rule 702 provides in part that an expert may be allowed to testify if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." This determination is within the sound discretion of the trial judge and will only be overturned for abuse of discretion.

United States v. Portsmouth Paving Corp., 694 F.2d 312, 323-324 (4th Cir. 1982). It is common knowledge that shiny bathroom floors are slippery. The trial judge correctly determined that Dr. Kreifeldt's "human factors" testimony would not have assisted the jury in understanding a matter so clearly within their experience and, therefore, should be governed by common sense.

In addition, the trial judge made a necessary independent inquiry under Rule 403 and concluded that Dr. Kreifeldt's testimony would be prejudicial. This court may reverse a Rule 403 determination only if a trial judge acted arbitrarily or in an irrational manner. United States v. Pehello, 668 F.2d 789, 790 (4th Cir. 1982).

Dr. Kreifeldt is a professor of engineering design and Tufts University.

His credentials are extremely impressive, yet he lacks any experience regarding hotel safety in general, or in testing bathroom floors and bathmats in particular. The potential for prejudice arises because the jury could yield their own common sense and experience to his purported expertise. Yet, Dr. Kreifeldt has no more or less experience in this area than the public in general. Accordingly, the trial judge's Rule 403 determination was proper.

II.

In granting the defendant's motion for a directed verdict, the trial judge stated that any condition which may have caused this fall was so open and obvious, that Mr. Christopher voluntarily assumed the risk therefrom. When ruling on a motion for a directed verdict, the trial

court "must view the evidence, and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff, and resolve any reasonable doubt to its sufficiency in his favor." Meeks v. Hodges, 226 Va. 106, 109, 306 S.E.2d 879, 881 (1983). "Whether a motion for a directed verdict should have been granted is a question of law requiring de novo review on appeal." Gairola v. Comm. of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985). The test is whether "without weighing evidence or considering the credibility of the witnesses, 'there can be but one conclusion as to the verdict that reasonable jurors could have reached.'" Gairola, 753 F.2d at 1285, quoting Wheatley v. Gadden, 660 F.2d 1024, 1027 (4th Cir. 1981). Thus, we must determine whether there was suffi-

cient evidence of assumption of risk requiring submission of the issue to the jury.

According to Mr. Christopher the negligence in this case was the risk created by using a terry cloth bathmat on a vinyl tile floor without slip resistant materials in place. This was not a latent condition; Mr. Christopher was aware that the bathmat lacked rubber backing. Mr. Christopher observed the floor, knew it was slick from its appearance, and put the bathmat on the floor. He testified that he had used this type of bathmat before at other hotels. Under these circumstances, Mr. Christopher voluntarily incurred the risk of any hazard. Tate v. Rice, 227 Va. 341 (Va. 1984). On who voluntarily assumes the risk of a known danger is barred from recovery in a negligence case. Arrington

Adm'r v. Graham, Adm'r, 203 Va. 310, 314 (Va.Ct.App. 1962).

"The essence of contributorily negligence is carelessness; of assumption of risk, venturousness. Thus, an injured person may not have acted carelessly; in fact, may have exercised the utmost care, yet may have assumed, voluntarily, a known risk. If so, he must accept the consequence." Stoner v. Robertson, 207 Va. 633, 151 S.E.2d 363, 366 (Va.Ct.App. 1966) [quoting Hunn v. Windsor Hotel Company, 119 W. Va. 215, 193 S.E.57, 58 (1937). Reasonable minds could not differ that Mr. Christopher voluntarily assumed a known risk. Accordingly, the trial court's decision granting the defendant's directed verdict motion was proper.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3149

F. KENNETH CHRISTOPHER

Plaintiff-Appellant

v.

MADISON HOTEL CORPORATION

Defendant-Appellee

On Petitioner for Rehearing with Suggestion for Rehearing In Banc

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ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that

it should be denied,

IT IS ORDERED, that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Staker, United States District Judge and Judge Howard, United States District Judge.

For the Court,

JOHN M. GREACEN

CLERK

(2)

No. 89-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. KENNETH CHRISTOPHER,

Petitioner,

v.

MADISON HOTEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. WAS THE COURT OF APPEALS' INTERPRETATION OF VIRGINIA LAW ON THE ASSUMPTION OF THE RISK DOCTRINE REASONABLE AND CONSISTENT WITH RULINGS OF THE SUPREME COURT OF VIRGINIA?
2. DID THE COURT OF APPEALS PROPERLY UPHOLD THE TRIAL COURT'S EXCLUSION OF PETITIONER'S EXPERT WITNESS, AN ENGINEER AND PURPORTED HUMAN FACTORS EXPERT, FROM THE TRIAL OF THIS CASE?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION AND ORDER BELOW

The Opinion rendered in this matter by the Court below dated May 4, 1989 and the Order denying the Petition for Rehearing and Suggestion for Rehearing In Banc dated May 26, 1989 are attached to the Petition Brief as the Appendix.

RULES INVOKED

The pertinent Federal Rules of Evidence provide as follows:

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to un-

derstand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

This is a simple slip and fall case sounding in negligence. The genesis of this action is Petitioner F. Kenneth Christopher's January 21, 1986 injuries which he sustained while exiting from his guestroom bathtub at the Comfort Inn in Alexandria, Virginia which was operated and managed by the Respondent Madison Hotel Corporation.[1] The Petitioner had finished showering and, before leaving the bathtub, grasped a steel bar to his right which was affixed to the stall. He stepped out of the tub by placing his left foot onto a terrycloth bathmat. He shifted his weight and slipped and fell onto his left knee claiming injuries to both his knee and his back.

[1] The Respondent Madison Hotel Corporation is a privately held Virginia corporation.

Suit was filed in the United States District Court for the Eastern District of Virginia on the basis of diversity jurisdiction.[2] Trial was held in July of 1988. Prior to trial, the Plaintiff named an expert witness, one John G. Kreifeldt, Ph.D., an engineer and purported human factors expert. The Defendant filed a Motion in Limine to exclude the testimony of this expert. The trial court granted the Motion. At the close of the Plaintiff's case, the trial court directed a verdict in favor of the Defendant based on the doctrine of assumption of the risk.

The Plaintiff took an Appeal to the United States Court of Appeals for the Fourth Circuit and, in a decision dated May 4, 1989, the three-judge panel unanimously affirmed the rulings of the trial court. A Petition for Rehearing In Banc was filed but denied by the court on May 26, 1989. The Petition for Writ of Certiorari to this Honorable Court followed pursuant to 28 U.S.C. §1254 (l).

SUMMARY OF ARGUMENT

Petitioner has raised two issues: the propriety of the granting of a directed verdict in favor of the Defendant on the doctrine of the assumption of the risk of injury and the propriety of the ruling excluding the testimony of a purported human factors expert from the trial of this case.

The District Court's rulings and the appellate court's affirmance of those rulings were completely proper. Prior to the slip-and-fall accident experienced by the Petitioner in his hotel bathroom, the condition of the premises was open and obvious to him. He was

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[2] 28 U.S.C. §1332.

familiar with the bathmat which was present in his room because he had used this type of bathmat before at other hotels. He was also aware of the fact that the bathmat lacked rubber backing. He observed the floor on which he placed the bathmat and knew it was slick from its appearance. It was properly held by both the Trial Court and the Court of Appeals that Mr. Christopher's acts in stepping on the bathmat under those circumstances constituted a voluntary assumption of the risk of a known danger thereby barring him from any recovery.

The testimony of Professor John Kreifeldt was properly excluded from the trial of this case for the reason that his testimony would not have assisted the trier of fact in deciding this case and because the prejudicial effect of his testimony would have outweighed any probative value. The condition of the premises where the Petitioner's injury occurred, and the dynamics of the Petitioner's acts in connection with the injury accident, were matters of common knowledge and did not lend themselves to expert testimony of a general nature which would not have focussed on hotel safety in general, or in testing bathroom floors or bathmats in particular. Having no more or less experience in this area than the public in general, Professor Kreifeldt, whose credentials were nevertheless impressive, was properly excluded as an expert witness for the Plaintiff at trial.

Accordingly, the questions which Petitioner raises are ones over which the exercise of this Court's certiorari power is neither appropriate nor necessary.

ARGUMENT
THE WRIT SHOULD BE DENIED

I. The Court of Appeals' Interpretation of Virginia Law on the Assumption of the Risk doctrine was reasonable and was consistent with rulings of the Supreme Court of Virginia

Petitioner contends that the Court of Appeals' interpretation of Virginia law on the issue of assumption of the risk of injury was unreasonable and that it merits review. Respondent disagrees. Under Virginia law, one who voluntarily assumes the risk of a known danger is barred from recovery in a negligence action.[3] The essence of the defense of assumption of the risk is venturousness and a Plaintiff must accept the consequences of such venturousness. In this case, the evidence clearly warranted a finding that the Plaintiff assumed the risk of injury.

The Plaintiff complained that the Defendant created a risk of injury by allowing its patrons to use a terrycloth bathmat on a vinyl tile floor without slip resistant materials in place. This condition, however, as noted by the Court of Appeals, was not a latent condition.[4] Mr. Christopher knew that the bathmat lacked rubber backing and observed that the floor was slick from its appearance but he nevertheless placed the bathmat on the floor. He also testified that he had used this type of bathmat before at other hotels. The Court of Appeals properly held that Mr. Christopher

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[3] *Arrington Adm'r v. Graham Adm'r*, 203 Va. 310, 314, 124 S.E.2d 199, 202 (Va. Court of Appeals 1962).

[4] See *Petition for Writ of Certiorari*, Appendix, p.A8.

voluntarily incurred the risk of any hazard by his own activities.[5]

The test which the appellate court followed in determining the propriety of the directed verdict in favor of the Defendant by the trial court was whether "without weighing evidence or considering the credibility of the witnesses, 'there can be but one conclusion as to the verdict that reasonable jurors could have reached.' "[6] The evidence was so clear on this issue that the court properly held that the Plaintiff assumed the risk of injury and was thereby barred from any recovery.

Petitioner places great emphasis on the case of *Amusement Slides Corporation v. Lehmann*[7] which involved an injury to the plaintiff when he became airborne while riding the "Sky Slide," an oversized amusement park slide ride. The record in that case was replete with evidence of warnings to the plaintiff and knowledge by the plaintiff of certain risks associated with the use of the slide. The issue on appeal, of course, was the plaintiff's assumption of a known risk. While plaintiff knew many of the risks associated with the use of the slide and while the plaintiff voluntarily assumed many of those risks, the risk that caused his injury was not known to him, fully appreciated by him or accepted by him. As stated by the court:

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[5] *Tait v. Rice*, 227 Va. 341, 315 S.E.2d 385, 388 (Va. 1984).

[6] *Gairola v. Comm. of Va. Dept. of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985), quoting *Wheatley v. Gadden*, 660 F.2d 1024, 1027 (4th Cir. 1981).

[7] *Amusement Slides Corporation v. Lehmann*, 217 Va. 815, 232 S.E.2d 803 (1977).

> It is true plaintiff assumed the risk of injury resulting from a ride down a steep incline at a controlled yet rapid speed. But plaintiff did not assume the hazard of injury due to the negligent failure of the defendant's employee to spread water on the waxed slide when plaintiff began to accelerate to an excessive and dangerous speed.[8]

This hidden risk that was present in the *Amusement Slides* case is absent in Mr. Christopher's case. The Petitioner herein did not expect a slip resistant surface. He was not unfamiliar with the type of mat used nor was he unaware of the shiny floor surface. The condition confronting him was open and obvious and he ventured forth completely aware of his circumstances. In holding that Mr. Christopher assumed the risk of injury, the opinion of the Fourth Circuit Court of Appeals was not inconsistent with the pronouncements of the Virginia Supreme Court in the *Amusement Slides* case.

Petitioner also refers to the case of *Colonial Natural Gas Co. v. Sayers*.[9] The plaintiff-tenant Sayers was injured when, while walking along a footpath at night, he fell into an open ditch containing a gas line. It is true that the Supreme Court of Virginia could not say as a matter of law that Sayers voluntarily assumed the risk of injuring himself in the open ditch because there was evidence that he did not know that there was an open ditch resulting from settlement of

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[8] *Ibid.* at 805.

[9] *Colonial Natural Gas Co. v. Sayers*, 222 Va. 781, 284 S.E.2d 599 (1981).

the ground where the installation had been completed even though he did know that a gas line had been installed several months previously. Once again, there was an unknown element in the *Sayers* case which was not present in this case. Both the *Amusement Slides* case and the *Sayers* case involved additional elements not known to the plaintiff and therefore presumably not considered by the plaintiff before the plaintiff ventured forth. In this case there were simply no "unknowns" to Mr. Christopher. He stepped on a terrycloth bathmat without backing on a shiny vinyl floor after having taken a shower. All of the elements of this scenario were open and obvious to him, known to him and appreciated by him.[10] As stated by the Supreme Court of Virginia in the *Amusement Slides* case, the standard primarily to be applied to the defense of assumption of the risk "is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates."[11] Mr. Christopher's venturousness has barred him from recovery and this Honorable Court should not disturb the rulings of the Court of Appeals in affirming the decision of the trial court.

Moreover, whether the District Court and the Court of Appeals erred in deciding that the Petitioner assumed the risk of injury is a question of state law,

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[10] Petitioner even concedes at page 16 of his Brief that "as a reasonable person [he] was aware of the slight risk of a slip-and-fall injury involved when taking a shower."

[11] *Amusement Slides Corporation v. Lehmann*, 217 Va. 815, 818-19, 232 S.E.2d 803, 805 (1877); *Restatement (Second) of Torts*, §496D, Comment c (1965); see also *McDowall & Wood, Inc. v. Kilby*, 211 Va. 476, 178 S.E.2d 497 (1971); and *Budzinski v. Harris*, 213 Va. 107, 110, 189 S.E.2d 372, 375 (1972).

not appropriate for this Court's review. This Honorable Court has repeatedly stressed that its role is not to review the decisions of Federal Appellate Courts on matters of state law.[12] There is no reason in this case to depart from this traditional rule. This simple slip-and-fall case does not rise to the level of a "special and important" matter warranting this Court's attention.[13]

II. The Court of Appeals properly upheld the Trial Court's exclusion of the Petitioner's expert witness at the trial of this case.

At the trial of this case, the District Court was confronted with a Motion in Limine filed by the defense to exclude the testimony of an engineer and purported human factors expert by the name of John G. Kreifeldt. Although Professor Kreifeldt's curriculum vitae was lengthy, it showed no hotel or motel experience nor any experience in studies surveying bathrooms, bathroom floors, tiling, terrycloth or terrycloth bathmats. There was no human factors' expertise or experience shown in the field of slip-and-falls in general or of the type and kind involved in this case. There was nothing of particular relevance to the facts of this case found in Professor Kreifeldt's background and he would have exhibited no unique experience in areas that the members of the jury would not have already possessed. His anticipated testimony would have included such statements as "the second largest cause of accidental deaths is falls,"

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[12] See for example *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Pierson v. Ray*, 386 U.S. 547, 558, n.2 (1967); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

[13] See Supreme Court Rule 17.

"145,000 falls on slippery bathroom floors have been reported" and that "a wet condition is a slippery condition." His anticipated testimony, therefore, though offered with the aura of scientific and academic credentials, would not have assisted the jury in deciding the case.

The Court of Appeals properly affirmed the Trial Court in its exclusion of the human factors expert in part because that testimony would not have assisted the jury and also because any probative value of that testimony would have been outweighed by the potential for prejudice. The trial and appellate courts relied upon Federal Rules of Evidence 702 and 403.

Rule 702 provides in part that an expert may be allowed to testify if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Testimony as to matters which are obviously within the common knowledge and experience of the jury is made inadmissible under Rule 702 generally because such testimony would not be of any assistance to the jury.[14]

Determinations of whether expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue are properly within the sound discretion of the trial court and will only be overturned for abuse of discretion.[15] Considering the evidence before the Court that the bathroom floor was indeed shiny and with findings at both the trial court and appellate levels that it is common knowl-

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[14] *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986).

[15] *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323-24 (4th Cir. 1982).

edge that shiny bathroom floors are slippery, it is clear that the exclusion of Professor Kreifeldt's testimony was not error inasmuch as it would not have assisted the jury in understanding a matter so clearly within their own experience and so clearly governed by their common sense.

The second prong of this issue, however, requires a consideration of Rule 403. A Rule 403 determination can be reversed only if a trial judge acted arbitrarily or in an irrational manner.[16] The basis for the trial court's finding that a potential for prejudice existed if the human factors expert were allowed to testify was grounded in the purported expert's lack of any experience regarding hotel safety in general, or in testing bathroom floors and bathmats, in particular. The court of appeals specifically found that the "potential for prejudice arises because the jury could yield their own common sense and experience to his purported expertise."[17] Since the expert had no more or less experience in this area than the public in general, his testimony would have been prejudicial had it been allowed. The court of appeals properly found that the trial court did not act arbitrarily or in an irrational manner but rather in a manner which exhibited a sound exercise of discretion. The analyses under Rules 702 and 403 were proper and Professor Kreifeldt's testimony was properly excluded.

CONCLUSION

It is respectfully urged that the Petition for Writ of Certiorari be denied. The granting of such a Writ

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[16] *United States v. Pehello*, 668 F.2d 789, 790 (4th Cir. 1982).

[17] See Petition for Writ of Certiorari, Appendix, p. A6.

is not a matter of right but rather of judicial discretion and the Petitioner has failed to show special and important reasons for the granting of such a Writ.[18] As Chief Justice Vinson stated in 1949:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.[19]

This case presents no such questions and the questions which have been raised by the Petitioner have had ample consideration at both the trial and appellate levels. Sound judicial discretion would dictate that no further review is in order.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[18] Supreme Court Rule 17.

[19] Address to the American Bar Association, September 7, 1949, 69 S.Ct. v, vi.